

Nguyen (Migration) [2018] AATA 2421 (19 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr NGUYEN Hoang Hai

VISA APPLICANTS: Ms NGUYEN Thi Phuong
Mr CHAU Ngoan Hien

CASE NUMBER: 1607117

DIBP REFERENCE(S): OSF2014/027077

MEMBER: Shane Lucas

DATE: 19 June 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas.

Statement made on 19 June 2018 at 4:53pm

1.

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) – Subclass 300 (Prospective Marriage) – Intention to marry – Financial resources – Money transfers to the Sponsor – No evidence of joint finances – Social aspects – Small engagement ceremony – Sponsor visited Vietnam – Irregular contact with each other – Inconsistent evidence regarding wedding plans – Credibility issues – Decision under review affirmed

LEGISLATION

2. *Migration Act 1958*, ss 5F, 65
3. *Migration Regulations 1994*, r 1.15A Schedule 3 cls 300.211, 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 March 2016 to refuse to grant the first-named visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
5. The first-named visa applicant is a Vietnamese national born on 12 June 1981. She applied for the visa on 24 December 2014. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevant to this matter, the primary criteria include cls.300.215, 300.216, and 300.221.
6. The delegate refused to grant the visa on the basis that the evidence and information provided was not sufficient to demonstrate that the parties have ever been, or intend to be, in a genuine and continuing relationship or intend to live together as spouses.
7. The review applicant appeared before the Tribunal on 13 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the first-named visa applicant and from one witness, being the aunt of the first-named visa applicant and a friend of the review applicant.
8. The applicant was represented in relation to the review by a registered migration agent.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issues in the present case are whether at the time of application the first-named visa applicant intends to marry an eligible person for the purposes of the Act (cl.300.211); whether at the time of application, the parties genuinely intend to marry and that the marriage is intended by the parties to take place within the visa period (cl.300.215(a) and (b)); whether at the time of application, the parties genuinely intend to live together as spouses (cl.300.216); and whether at the time of decision, the first-named visa applicant continues to satisfy the criteria (cl.300.221).

Does the visa applicant intend to marry an eligible person?

11. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the first-named visa applicant claims to intend to marry the review applicant. The parties provided documentation attesting that the review applicant (born in Vietnam on 1 November 1964) became an Australian citizen on 12 April 1984. Accordingly, the review applicant satisfies the requirements of cl.300.211.

Other relevant criteria

12. The Tribunal is satisfied that cls.300.212, 300.212A, 300.213 and 300.214 are met.

Do the parties genuinely intend to marry?

13. Clause 300.215(a) and (b) requires that at the time of application the parties have a genuine intention to marry and that the marriage is intended to take place within the visa period. The applicants have provided written statements and given oral evidence attesting to the holding of an engagement ceremony in Cau Mau, Vietnam on 20 November 2013. The parties also provided a Notice of Intended Marriage (dated 8 June 2018) authorised by a civil marriage celebrant stating that the parties intend to marry in St Albans, Victoria on 30 December 2018. On the evidence before it, the Tribunal is satisfied that the requirements of cl.300.215 are met.

Do the parties genuinely intend to live together as spouses?

14. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)[(a)-(d)]. In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
15. The parties provided documentation and gave oral evidence relating to the considerations for spousal relationships. Having regard to these considerations and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings:

16. Financial aspects of the relationship

17. The Tribunal was provided with documentation and oral evidence regarding the financial aspects of the relationship between the parties. The parties provided documentation affirming that the review applicant has sent an irregular series of money transfers to the first-named visa applicant totalling some AUD 7800 between January 2014 and October 2017. In oral evidence, the review applicant stated that he sends the first-named visa applicant money "when he can", but could not remember with certainty the regularity or amounts of these transfers. The documentation indicates that the review applicant sends these moneys at intervals varying between two months and ten months.
18. The Tribunal accepts that the review applicant assists the first-named visa applicant financially through these money transfers. However, the Tribunal finds no evidence that these transfers represent a reliable and consistent contribution such as would indicate that the parties have pooled their financial resources, especially in relation to major financial commitments.
19. The parties do not claim to have a joint bank account, but do claim to have shared some day-to-day household expenses during the review applicant's periods in Vietnam between 2015 and 2018. The parties do not claim to have joint ownership of real estate or other major assets; do not claim to have any joint liabilities; and do not claim that one person in the relationship owes any legal obligation in respect of the other.

20. On consideration of the evidence, the Tribunal finds that the review applicant has assisted the first-named visa applicant financially and that the couple have shared some day-to-day household expenses. However, the Tribunal found no evidence that the parties have pooled their financial resources, especially in relation to major financial commitments. Moreover, the Tribunal found no evidence that the parties have acquired joint ownership of real estate or other major assets; have any joint liabilities; or that one person in the relationship owes any legal obligation to the other. Given the constraints of residing in separate countries however, the Tribunal gives the financial aspects of the relationship little weight in determining the parties' genuine intention to marry and live together as spouses.

21. Nature of the household

22. The Tribunal received oral evidence from the parties regarding the nature of the couple's household. Since being introduced by the witness at Tan Son Nhat International Airport in Ho Chi Minh City on 5 September 2013, and conducting an engagement ceremony on 20 November 2013, the couple claim to have lived together (for some periods) on those occasions that the review applicant has visited Vietnam, being February-March 2015 (approximately four weeks); October-November 2016 (approximately six weeks); January-March 2018 (approximately six weeks); and April-May 2018 (approximately three weeks).
23. In oral evidence, the review applicant confirmed that he has not always resided with the first-named visa applicant at these times, as he also travelled to Vietnam to spend time with his elderly father in Ho Chi Minh City, some three hundred kilometres from the first-named visa applicant's home in Cau Mau. By way of example, the review applicant stated that his most recent visit to Vietnam in April-May 2018 was principally undertaken for the purpose of supporting his father while his sister was in Australia, and that he did not live with the first-named visa applicant "much" during his three-week stay.
24. In the decision of the delegate, it is noted that the first-named visa applicant provided documentation attesting that she lived at the sponsor's family home in Ho Chi Minh City between 17 April 2015 and 20 May 2015. The Tribunal has also considered this certificate and the accompanying accredited translation as evidence of the nature of the couple's household. The Tribunal notes that the translation includes the statement that the document has been sought "to supplement documents for my husband nominating me to Australia"; the Tribunal also notes that the period in question does not coincide with the review applicant's stay in Vietnam in 2015.
25. The review applicant did claim that he spent several weeks living with the first-named visa applicant in a room at his sister's house while in Vietnam between 6 February 2015 and 6 March 2015, and that the couple were physically intimate for the first time during this period. In further oral evidence, the review applicant stated that the first-named visa applicant only stayed with him on "some weekends" during this period due to her work commitments. In considering the oral evidence provided by the parties, the Tribunal finds that the couple's separate accounts of their time together in the review applicant's periods in Vietnam since their engagement in November 2013 to be inconsistent and to lack credibility.
26. The Tribunal also received documentation purporting to demonstrate the couple's ongoing communication via telephone during their periods of separation over the course of their relationship. While the first-named visa applicant's telephone number appears in the review applicant's telephone records on occasion, the instances are irregular and do not demonstrate a consistent pattern of contact such as might demonstrate that the persons genuinely intend to marry and live together as spouses. In oral evidence, the first-named visa applicant confirmed that the parties do not speak on the telephone regularly due to the review applicant's hearing problems.

27. On the basis of the evidence, the Tribunal finds that the couple has resided together for short periods since becoming engaged in November 2013. The Tribunal found no evidence of any sharing responsibility for housework and no evidence of any joint responsibility for the care and support of children. Given the constraints of residing in separate countries however, the Tribunal gives little weight to the nature of the parties' household in seeking to determine the parties' genuine intention to marry and live together as spouses.

28. Social aspects of the relationship

29. The Tribunal received oral evidence from the parties and the witness regarding the social aspects of the relationship between the parties. The Tribunal also received photographic evidence purporting to attest to the social aspects of the relationship. The Tribunal received no Statutory Declarations or written statements from any third parties in support of the application.
30. In oral evidence, the review applicant stated that the couple held a small engagement ceremony in Cau Mau on 20 November 2013. The review applicant stated that the modest nature of the ceremony was due to the death of his mother a few weeks previously and hence, he was concerned that his family might think it inappropriate for him to hold a large party or celebration at that time. The review applicant confirmed that his two brothers (usually resident in Australia) travelled to Vietnam for their mother's funeral, but that neither attended his engagement ceremony. The review applicant also confirmed that his adult son (then 22 years of age) was in Vietnam at that time, but that he did not attend the engagement ceremony either. By way of explanation, the review applicant first stated that this was because his son has a closer relationship with his mother (the review applicant's first wife) than with him; he then stated that it was because his son had gone on a "tour" to another part of Vietnam. In response to further questions from the Tribunal, the review applicant claimed that both his adult children are supportive of his relationship with the first-named visa applicant.
31. In oral evidence, the first-named visa applicant stated that the review applicant has met members of her family and friendship network. In further oral evidence, the witness – being the aunt of the first-named visa applicant and a friend of the review applicant – confirmed that she introduced the couple at the airport on 5 September 2013, as she had travelled to Vietnam on the same flight as the review applicant and the first-named visa applicant was there to collect her. Both the witness and the review applicant stated that it was a "coincidence" that they were on the same flight. In response to questions from the Tribunal, the witness denied introducing the parties and/or facilitating the relationship for the purposes of achieving a migration outcome for her niece. The witness stated that she has known the review applicant since approximately 1985; that she wants him to be happy; and that she believes his relationship with the first-named visa applicant may help him to address his problems with alcohol and gambling. The witness provided no additional evidence regarding the social aspects of the relationship.
32. The photographic evidence provided shows the couple together and/or in the company of others during periods when the review applicant has been in Vietnam. The photographs appear casual and portray the parties in various social and recreational settings including the airport, restaurants and family homes. On consideration of this evidence, the Tribunal finds that the photographs submitted in support of the application do not provide substantive evidence of the social aspects of the relationship, other than they suggest the review applicant has met some members of the visa applicant's family and friendship network on more than one occasion.
33. On considering the evidence, the Tribunal finds that the couple do not represent themselves to other people as genuinely intending to live together as spouses. The Tribunal also finds

that the evidence does not provide a substantive indication of the opinion held by the parties' friends or acquaintances as to the nature of the relationship or the couple's genuine intention to marry and live together as spouses. Furthermore, the Tribunal found no evidence that the couple undertake and plan joint social activities, over and above the small engagement ceremony conducted in November 2013, such as would indicate that they have a genuine intention to live together as spouses.

34. Nature of the person's commitment to each other

35. The Tribunal received oral evidence regarding the nature of the persons' commitment to each other. The couple claim to have met at Tan Son Nhat International Airport in Ho Chi Minh City on 5 September 2013 when the first-named visa applicant came to the airport to collect her aunt (the witness) who was travelling on the same plane as the review applicant. The review applicant stated that he had travelled to Vietnam to visit his elderly and unwell mother, noting that she passed away several weeks later on 30 October 2013. In oral evidence, both the review applicant and the witness stated that it was "coincidence" that they were travelling to Vietnam on the same flight.
36. The review applicant stated that he travelled directly to his mother's home on arrival in Vietnam, but that he met the first-named visa applicant a second time several days later at the home of the witness's family. The review applicant invited the first-named visa applicant to come to his home, at which time she met his parents. On 14 October 2013, the review applicant travelled to Cau Mau to again visit the first-named applicant and the witness, who had travelled to Cau Mau in the intervening time. Due to his mother's illness, the review applicant returned to Ho Chi Minh City on 17 October 2013.
37. In oral evidence, the first-named visa applicant stated that the relationship between the persons began after the death of the review applicant's mother on 30 October 2013 as a result of the comfort she provided him after his bereavement. In oral evidence, the review applicant stated that the couple had only "short conversations" at this time. Notwithstanding the limited contact between the parties to this point, the review applicant claims to have proposed marriage on 5 November 2013, a proposal accepted immediately by the first-named visa applicant.
38. The review applicant returned to Australia on 5 December 2013, some two weeks after the couple's engagement ceremony on 20 November 2013. The review applicant did not return to Vietnam until February 2015 and has only spent a limited time (approximately twenty weeks) in Vietnam subsequently. In oral evidence, the review applicant affirmed that his return visits have also been to support his elderly father and that the couple have not resided together consistently during these periods.
39. In response to questions from the Tribunal, the review applicant stated that the parties have not sought to formalise their relationship (i.e. become legally married) over the past more than four years due to the difficulty in registering a marriage with the Vietnamese authorities. The review applicant also claimed that he wants to get married in Australia so that his brothers and children can attend the wedding. The review applicant also claimed that his family members would not be able to travel to Vietnam for his wedding because "they have work". The first-named visa applicant claimed that she wants to get married in Australia – rather than Vietnam – so she can celebrate her wedding with her relatives in this country. In response to questions from the Tribunal, the first-named visa applicant affirmed that her parents and siblings reside in Vietnam, and that she has aunts (including the witness) and cousins resident in Australia. The Tribunal finds that the parties' responses on this issue lack credibility and demonstrate that the persons do not have a commitment to each other such as would suggest they have a genuine intention to marry and live together as spouses.

40. On consideration of the evidence, the Tribunal accepts that the couple have known each other for more than four years since first meeting in Vietnam in September 2013. The Tribunal also accepts that the parties have spent time together in the periods in which the review applicant has travelled to Vietnam subsequent to their engagement ceremony in November 2013. However, the Tribunal finds the parties' account of the inception, development and extant nature of their relationship to lack credibility. The Tribunal therefore finds that the couple have not lived together such as would demonstrate that they have a genuine intention to live together as spouses.
41. On the basis of the evidence, the Tribunal finds that the nature of the couple's "in-person" contacts and their irregular telephone communication does not indicate that the persons draw on each other for a degree of companionship and emotional support such as would demonstrate their genuine intention to live together as spouses. In response to questions by the Tribunal, the parties made high-level, generic statements regarding their commitment to each other and their view of the relationship into the future. The Tribunal therefore finds that the couple do not view their relationship as a long term one such as would demonstrate their genuine intention to live together as spouses.
42. On the basis of the evidence detailed above, the Tribunal is not satisfied that at the time of the visa application, the parties genuinely intended to live together as spouses; therefore cl.300.216 is not met.

Do the parties continue to meet time of application requirements?

43. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cls.300.211, 300.214, 300.215 and 300.216. As detailed above, the Tribunal is not satisfied that cl.300.216 is met; accordingly, cl.300.221 is not met.
44. For the reasons above, the Tribunal finds that the first-named visa applicant does not satisfy the criteria for grant of the visa.
45. In relation to the secondary visa applicant, the Tribunal finds that as the review applicant and primary visa applicant do not satisfy the criteria for grant of a Prospective Marriage (Temporary) (Class TO) visa, the second-named visa applicant cannot meet the criteria for a Subclass 300 visa as a member of the family unit of a person who has satisfied the primary criteria. The Tribunal therefore affirms the decision under review in relation to the secondary visa applicant.

DECISION

46. The Tribunal affirms the decision not to grant the first-named visa applicant a Prospective Marriage (Temporary) (Class TO) visa.

Shane Lucas
Member